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Potential §404 Assumption & Oregon's Federal Consistency Authority

PURPOSE

The purpose of this memo is to outline the current state of Oregon Department of Land Conservation and Development's (DLCD) knowledge in regards to the legislative report on proposed Section 404 Assumption (Section 404 of the federal Clean Water Act) being prepared by the Oregon Department of State Lands (DSL). It offers key context and background on Oregon's federal consistency authority granted under the Coastal Zone Management Act (CZMA) of 1972 and the concerns associated with the potential loss of federal consistency authority in assumed areas. This memo explores possible alternatives for addressing these concerns and limitations that should be considered. Note that this memo serves as a *preliminary* assessment and recommendations from DLCD, with recognition that continued discussion and coordination between DLCD and DSL will take place through 2023. DLCD suggests that DSL consider this information for incorporation into its upcoming report to the Oregon legislature.

DLCD'S CURRENT UNDERSTANDING: §404 ASSUMPTION

Currently, applicants are required to go through two separate permit processes to obtain approval for development that has an impact on wetlands and waterways in Oregon – one process from the U.S. Army Corps of Engineers (Corps) and one process from the Oregon Department of State Lands (DSL). "Partial 404 assumption¹" (Section 404 of the federal Clean Water Act) would provide a process for applicants to obtain state and federal authorizations with a single permit issued by the DSL.

The goal of a single state permit process is to streamline development opportunities in Oregon (e.g., commercial, residential and industrial development within Urban Growth Boundaries (UGBs) while achieving the same outcome as two separate permits. The U.S. Environmental Protection Agency (EPA) requires that environmental protections under an assumed 404 program remain equivalent to or better than the federal program, with program results being regularly evaluated by EPA to ensure standards are being met.

DSL has provided that the proposed partial assumption process in Oregon's federally-approved coastal zone would only apply to lands within UGB's, with the caveat that areas within a 1,000 foot buffer around

¹ Partial 404 assumption is not currently approved by the federal government, but federal rulemaking is anticipated for fall 2020 allowing partial assumption.

§10 navigable waters and the maximum extent of tidal wetlands (50% exceedance) will remain under Corps jurisdiction.

DSL predicts approximately 10% of State 404 permits would take place in the coastal zone (based on historic Removal-Fill permits). DLCD-OCMP has conducted preliminary analysis to quantify the potential impacts of assumption on CZMA authority. This analysis is available later in this memo.

OREGON'S FEDERAL CONSISTENCY AUTHORITY & §404 REVIEW

Oregon's federal consistency authority is sourced from the CZMA which sets up a flexible and voluntary process for coastal and Great Lakes states to create state coastal management programs. OCMP was the second state program in the nation to become federally approved.

Within a state coastal program, federal consistency is governed by both federal regulations and state rules. Based on the type of federal activity and lead entity, different federal consistency review pathways and regulations exist –

Direct Federal Actions (Title 15 CFR §930, Subpart C): Under the current system, if a federal agency requires a 404 permit, OCMP treats the project as a direct federal activity under this section of the federal regulations. This pathway comes with a 60-day review timeline as well as no requirement for the federal entity to obtain any state or local permits. The federal entity does have to show consistency with the underlying enforceable policies including state and local permits.

Federal Permits for Non-Federal Entities (Title 15 CFR §930, Subpart D): This pathway is for non-federal entities applying for a federal permit. These reviews include a 6-month review period and may require extensive agency coordination to determine if consistency has been met with all of Oregon's enforceable policies. Under this subpart of the federal regulations, applicants are required to receive all state and local permits and disclose any anticipated impacts to coastal resources. Additional permit procedures have been created for particular Nationwide permits, including an advanced concurrence pathway that requires the Corps to automatically incorporate Coastal Zone conditions on associated permits².

Oregon State Federal Consistency Rules (OAR 660-35): These state Administrative Rules contain the requirement that federal permit reviews must have all state and local authorizations issued and submitted to OCMP prior to the issuance of a federal consistency decision. This requirement exists because issuance of the state and local authorizations is the only definitive way to determine consistency with the underlying enforceable policies³.

HISTORY OF DSL/DLCD COORDINATION FOR FC REVIEW

The Oregon Coastal Management Program (OCMP) is a networked program including state natural resource agencies and local governments within the coastal zone. DLCD is the lead agency within the network and coordinates federal consistency reviews pursuant to federal regulations.

² <https://www.oregon.gov/lcd/OCMP/Pages/Federal-Permit.aspx#42e76eb3-392d-4f73-8b22-cf88a0f626bf>

³ 660-035-0050(4): Evidence supporting consistency for federal license or permit activities: For activities located within the state's jurisdiction that require state or local permits or authorizations, the issued permit or authorization is the only acceptable evidence demonstrating consistency with the enforceable policies that the permit or authorization covers.

The Department of State Lands is a networked partner of the OCMP and plays a critical role in federal consistency reviews by providing necessary expertise and the review and issuance of Removal-Fill and Proprietary permits necessary to demonstrate consistency with the applicable enforceable policies pursuant to OAR 660-35.

ANALYSIS OF PARTIAL §404 ASSUMPTION IN THE COASTAL ZONE

DLCD-OCMP conducted a preliminary analysis using map layers provided by DSL⁴. The following analysis investigates 10-year historic DSL regulatory permit data (state-wide). All calculations should be regarded as approximations. Additional analysis will need to be conducted on historic permits issued by the U.S. Army Corps of Engineers to calculate more accurate impacts to Oregon's federal consistency authority under an assumed 404 Program -

Metric	Number of Permits Issued
Total number of regulatory permits within the Coastal Zone ⁵ in assumable waters.	106
Total numbers of regulatory permits issued in high hazard zones within assumable waters.	
FEMA Significant Flood Hazard Area,	17
Tsunami Inundation Zone	41
Total numbers of regulatory permits issued in critical habitat areas within assumable waters. (habitats include forested wetlands and dunal wetlands)	4

*Assumable waters: Within Urban Growth Boundaries, outside of Section 10 Navigable waters 1,000ft buffer and tidally influenced waters ("50% Exceedance" in web map).

ASSUMPTION OF SECTION 404 IS A FEDERAL ACTION

EPA's decision to approve or deny a state request to assume the Section 404 permit program requires EPA to prepare a consistency determination because state assumption of 404 would have reasonably foreseeable effects on the coastal resources within Oregon's coastal zone. DLCD will notify EPA and NOAA-OCM of its request for a consistency determination if assumption is anticipated to take place following this legislative report.

Federal Action Review: Any 404 Assumption proposal through the EPA will be classified as a federal action under Title 15 CFR §930 Subpart C. This review pathway requires the federal agency taking an action (i.e. rulemaking) to submit a comprehensive consistency determination containing an enforceable policy analysis and a coastal effects evaluation. DLCD encourages DSL and EPA to begin early coordination for Federal Consistency Review under Subpart C (Federal Actions) of the federal regulations. As part of this federal action review, the EPA will need to submit a comprehensive consistency determination⁶ to DLCD-OCMP indicating how the action is consistent with the enforceable policies of the OCMP.

⁴ <https://maps.dsl.state.or.us/404Assumption/>

⁵ Based on total number of historical regulatory permits (11,170 permits state-wide), DSL predicts approximately 10% of the total historical permits State 404 permits would take place in Oregon's federally approved coastal zone.

⁶ Additional information on the requirements of this consistency determination can be found in [Title 15 CFR §930.30](#)

CONCERNS RELATING TO 404 ASSUMPTION

DLCD-OCMP remains concerned that an assumed 404 program, as presented by DSL, would remove the federal nexus triggering Oregon's federal consistency authority under the CZMA. This is of particular concern given that the area under consideration in the coastal zone for partial assumption (i.e. UGB's) are the most likely locations for development.

Similar to Section 401 compliance, the authority held by the CZMA is not federally preemptable and therefore gives Oregon a stronger level of authority on complex and controversial projects. DLCD-OCMP is concerned that if Section 404 is assumed by the state, that the federal government will be able to preempt all state permits. Authorities granted under the CZMA and the Clean Water Act 401 program are the only authorizations that cannot be federally preempted under federal law.

DSL 404 assumption may also limit the OCMP's ability to implement enforceable policies (statewide planning goals, Oregon revised statutes, and local comprehensive plans and land use regulations) of the program. DLCD will need to coordinate with other networked agency partners to determine how this change may impact those agencies and their respective coastal policies and authorities

INFORMATION NEEDS & QUESTIONS

DLCD-OCMP needs to have the following questions and information needs addressed to inform the analysis of the proposed partial assumption on Oregon's federal consistency authority-

1. How many historical Corps 404 permits have been issued in the area being proposed for partial assumption?
 - Conducting the same analysis as above using Corps permit metrics is critical to determining level of impact that assumption will have on Oregon's federal consistency authority.
2. How will this assumption process consider perpetual UGB updates and expansion?
3. Will state consistency be feasible due to DSL's jurisdictional constraints?
 - OCMP enforceable policies are sourced from a multitude of state natural resource agencies, local jurisdiction comprehensive plans and ordinances, as well as the Statewide Land Use Planning Goals. To maintain protections currently under the CZMA would require DSL to have the authority to holistically review permits through this lens.
4. How would assumed 404 permits translate into DSL's current permitting framework?
 - Would the current federal naming system and framework be translated into DSL's current permit system and would this change the way permits are reviewed?
5. Under an assumed program, are federal entities required to obtain a state-issued 404 permit for an applicable project?
6. How will 404 permits applied for by a federal entity be evaluated under the assumed program in a way that is equivalent to current standards?

ALTERNATIVES ANALYSIS

Alternative 1: Creation of a State Consistency Process

A more limited alternative (lower standard of protection) would be the creation of a new comprehensive state consistency process that encompasses the authority of all of the jurisdictions that OCMP sources

enforceable policies from. This option is anticipated to be costly and limited in regards to federal preemption.

1. DLCD believes that the **State Agency Coordination Agreement** between DLCD and DSL may be an appropriate mechanism to address any identified issues related to 404 assumption and OCMP's federal consistency review authority to ensure compliance with enforceable policies. However, this does not protect the state in a scenario where federal preemption can take place. DSL assumption would remove the federal nexus required for federal consistency review under the CZMA.
2. Another alternative could be the exploration of initiating **state consistency review**. There are other examples of coastal management programs that complete state consistency reviews to ensure compliance with coastal enforceable policies. Creation of a state consistency review process would require legislative changes and extensive rulemaking.
3. Other ways to address issues related to coastal policy compliance could be through **memoranda of agreements/understandings** or other formal coordination agreements.
4. Integrate OCMP enforceable policies into the State 404 permitting process. This would likely require extensive legislative updates granting DSL the authority to implement the policies of OCMP networked agency partners. (Examples of state legislation: North Carolina)
5. Creation of an **appeal process and associated oversight body** to assure that OCMP objections to DSL issuance has oversight if appealed.

Alternative 2: Proceed with Partial Assumption with Specific Exclusions in the Coastal Zone

Create a system that allows controversial, complex, or priority-activity projects to be evaluated by the Corps rather than fall under the DSL partial assumption process. A non-exhaustive list of potential exclusions have been outlined below. Additional considerations for exclusions will need to be evaluated and agreed upon by DLCD-OCMP and DSL prior to implementation -

- Any activity encountering **critical habitat** as described in DLCD-OCMP's Critical Habitat Mapping Tool⁷
- Projects proposed within the highest **hazard zones** (FEMA flood hazard areas, and tsunami inundation areas)
- Exclude specific projects that fall under special **authorities permitting federal preemption** (i.e. Energy projects under the Natural Gas Act)

Alternative 3: Exclude the Coastal Zone from the proposed 404 Assumption

As with any alternatives analysis, a "no change" alternative should always be considered. In this instance, this is the only alternative that meets the EPA requirement that state assumed programs meet an equivalent standard of protection given that without a federal nexus triggering Oregon's CZMA authority, assumed 404 permits would not receive any federal consistency review.

Alternative 4:

Oregon, via a joint agency letter vetted by the Governor's Office, may notify the EPA and NOAA regarding the inherent conflict between CZMA and state assumption of Section 404 of the CWA. The CZMA requires a federal nexus to trigger the authority to review an activity for consistency. Under an assumed 404 program, this nexus does not exist. Considering the federal government is encouraging state assumption of 404 authority, the EPA and NOAA should consider a reasonable pathway to assure that the required

⁷ <https://geo.maps.arcgis.com/apps/webappviewer/index.html?id=1b4a3202b66c4ab79b6907e7b4abf9db>


federal nexus for CZMA review is achieved or appropriately waived if federal authority is assumed by a state agency.

CONCLUSIONS

At this time, DLCD-OCMP, in coordination with DSL, considers Alternative 4 to be the best next step in this process. Given that the EPA has set the standard that assumption must provide equivalent protections for state resources, if the federal government is unable to provide helpful guidance on the issue of federal nexus, DLCD-OCMP does not believe an alternative exists with the same level of protections as granted by the CZMA. DLCD-OCMP also anticipates a need to further consult with networked agencies of the OCMP to identify additional concerns.

Thank you for coordinating on these efforts. Staff look forward to continuing to working toward a solution to these concerns.

Sincerely,



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